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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents are fighting a losing battle with the text of the federal transfer statutes. Section 1407(a) states that *every* case —"[e]ach action"—subject to a multidistrict transfer "shall be remanded" at or before the conclusion of coordinated pretrial proceedings unless it has been "terminated." But respondents contend that many live actions *need not be remanded at all.* Similarly, *both* section 1407(a) and section 1407(b) confirm that multidistrict transferee courts have only the limited power to conduct "coordinated or consolidated pretrial proceedings." But respondents argue that those courts may bootstrap their circumscribed authority into a boundless license to preside over *all* proceedings, including trial. Finally, section 1404(a) states that a district court may transfer a case to any "*other* district." But respondents assert that a district court may properly "transfer" a case to *itself*.

Respondents, like the Ninth Circuit before them, have offered no plausible way of plugging these gaping holes in their statutory argument. To harmonize their desired result with the plain language of section 1407(a), respondents are reduced to claiming that a transferee court's decision to "transfer" a case to itself for all purposes is actually a "termination" of the "action," so that the mandatory remand requirement does not apply. Milberg Br. 23. But a "transfer" is utterly inconsistent with a "termination." When an action is terminated, there is nothing left to transfer. Conversely, when an action is transferred it remains very much alive; indeed, the only reason to transfer an action is that it has *not* been terminated. The evident failure of respondents' argument on this point—their only attempt to give meaning to section 1407(a)'s mandatory remand language—is itself a sufficient basis to reject their understanding of the statute.

Respondents fare no better in their discussion of sections 1407(b) and 1404(a). They ignore clear statutory language; they disregard unequivocal evidence of legislative intent; and their policy analysis is nothing more than

an attempt to secure a result that Congress rejected both when it passed section 1407 and when it declined to adopt numerous later proposals to amend it to cover all proceedings, including trial.

Given the weakness of their merits contentions, respondents are left recycling the same grab-bag of non-merits arguments that they advanced in opposing certiorari. There is no reason to revisit these matters now. In any event, respondents' arguments are without merit and provide no bar to the Court's deciding the important and recurring legal issue squarely presented here.[1]

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[1] Lexecon will not burden the Court's consideration of the purely legal issues before it with correction of all of Milberg's distortions of the underlying dispute. A few points are worth noting, however. First, this case is not an attempt to relitigate *Lincoln Savings*; five of the six counts in Lexecon's complaint have nothing to do with the resolution of that matter. CR 127, Amended Complaint. Moreover, Milberg's allegations are false: the Lexecon reports at issue in *Lincoln Savings* were truthful and accurate, and no judge or jury has ever decided otherwise. Indeed, the very regulators who received those reports—and who Milberg claims that Lexecon defrauded—have continued to hire Lexecon and Professor Fischel in savings and loan cases, long after the Lincoln Savings collapse and, in fact, *attempted to retain Lexecon as the government's expert in the Lincoln Savings trial itself*. CR 697 at 30, Test. of D. Fischel. Finally, Milberg's reliance on Judge Bilby's later recollection of the conclusion of the *Lincoln Savings* case is misplaced; at the time of Lexecon's dismissal, the court-approved notice informed the class action plaintiffs that Lexecon was a "non-settling defendant" that paid no consideration for its dismissal. *See* CR 18, Exh. F. Lexecon voluntarily returned the $700,000 it had received in fees from Lincoln Savings months *after* it was dismissed from that case and not in any way as a *quid pro quo* for the dismissal. Any reliance on Judge Bilby's extra-judicial statements would be particularly unwarranted in light of his decision to recuse himself from any future participation precisely because, as he saw it, he could not fairly evaluate the merits of Lexecon's case. *See* J.A. 74 & n.16 (Kozinski, J., dissenting) (finding it "troubling" that the majority relied on Judge Bilby's views "in characterizing Lexecon's case").

I. CONGRESS EXPRESSLY CONFINED MULTIDISTRICT TRANSFERS TO "COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS" AND DIRECTED THAT "EACH ACTION" "SHALL BE REMANDED" AT OR BEFORE THE CLOSE OF THOSE PROCEEDINGS.

A. The Language of Both Section 1407 and Section 1404 Defeats Respondents' Argument.

1. Congress enacted a straightforward, coherent, and carefully limited scheme for the conduct of multidistrict litigation. The Judicial Panel on Multidistrict Litigation ("JPML" or "panel") may transfer cases only for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The transferee court, in turn, is empowered to oversee only "[s]uch coordinated or consolidated pretrial proceedings." *Id.* § 1407(b). No later than the end of those coordinated proceedings, the JPML must return the case to the district originally chosen by the plaintiff. Congress provided only a single explicit exception to this otherwise categorical requirement: "*Each action* so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated*." *Id.* § 1407(a) (emphasis added).

Respondents would tear this scheme apart at the seams. Under their theory, since section 1407(a) requires only the panel, not the transferee court, to order such remands, transferee courts are free to ignore that statutory limitation entirely. *See* Milberg Br. 15-20. According to respondents, the only constraint on "self-transfer" comes not from section 1407, but rather from section 1404(a), which authorizes all-purpose transfers only to those courts where the case "might have been brought."

That analysis is plainly wrong. The multidistrict litigation statute, like all laws, must be read to " 'give effect, if possible, to every clause and word' " that Congress enacted. *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538

(1955)). An interpretation that " 'emasculate[s] an entire section' " of the law fails that basic test. *Id.* (quoting *Menasche*, *supra*); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Congress said that "[e]ach action . . . shall be remanded." That provision—written in language as "clear as sunlight" (J.A. 57 (Kozinski, J., dissenting))—must be given effect. Thus, regardless of whether the remand requirement is addressed directly to transferee courts, those courts may not act in a way that short-circuits the JPML's unqualified duty to return to plaintiff's chosen forum *every live section 1407 case*—not just those in which, by happenstance, transfer under section 1404 may not be available.[2]

Even respondents seem to recognize that the statute must be understood in a way that gives effect to Congress's mandate that all these actions "shall be remanded" unless they have been "terminated." Thus, after initially seeking to evade that requirement entirely, respondents ultimately argue that when a transferee court "transfers" a case to itself (or to another court), the "action" has actually been "terminated" for purposes of section 1407. Milberg Br. 23. But that theory makes nonsense of the statutory language. The JPML's own rules explain that an action is "terminated," not upon transfer to another venue, but upon entry of a "valid judgment, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation." JPML Rule 14(a). And, in ordinary English, an action is "terminated" when it is

[2] Indeed, if it were true, as respondents argue, that the remand requirement applies only to the JPML, and has no effect where cases are not voluntarily returned by the transferee court, there would have been no need for Congress to specify that the remand requirement does not apply when cases are "terminated." Cases that are terminated, like cases that are self-transferred, never even return to the JPML. Thus, respondents' argument—aside from undermining the "shall be remanded" language—renders the phrase "unless . . . previously terminated" mere surplusage.

"br[ought] to an ending or cessation"; by contrast, an action is "transferred" when it is "carr[ied] or take[n] from one person or place to another." *Webster's Third New International Dictionary* 2359, 2426-27 (1993). Indeed, only an action that has *not* been terminated is even a candidate for transfer. In the end, therefore, respondents cannot avoid the fact that self-transfer renders the "explicit" and "mandatory" language of section 1407(a) a dead letter. Brief of Charles Alan Wright as *Amicus Curiae* 4-5 (Apr. 11, 1997). For that reason alone, their arguments should be rejected.

Nor can respondents draw any comfort from section 1407(b). Contrary to their assertion, that provision explicitly *confirms* that a multidistrict transferee court's authority to oversee a case is *coextensive* with—not greater than—the power of the JPML to transfer the case.

The language of section 1407(b)—"[s]uch coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation"—tracks that of section 1407(a) precisely. The reference to "[*s*]*uch* coordinated or consolidated pretrial proceedings" is plainly a reference to the limited proceedings for which transfer is authorized in subsection (a) and at or before the conclusion of which a remand is required under subsection (a). Thus, subsection (b) by its own terms *explicitly* forecloses the argument that a transferee court may unilaterally convert its limited authority over a subset of pretrial proceedings into the power to control the venue of the entire case. Congress confined the scope and duration of a transferee court's power by allowing transfer "*only* for pretrial purposes." *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (emphasis added), *aff'd on other grounds*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

That straightforward understanding of section 1407(b), moreover, is the *only* interpretation of that provision that is compatible with the statute as a whole. Section 1407(b)

must be harmonized with section 1407(a). *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (emphasizing "that a statute is to be read as a whole") (internal quotation omitted); *Beecham v. United States*, 511 U.S. 368, 372 (1993) ("the plain meaning that we seek to discern is the plain meaning of the whole statute").

If a transferee court is limited to overseeing coordinated pretrial proceedings, sections 1407(a) and (b) dovetail perfectly. At the moment that a transferee court loses its authority to rule under subsection (b), subsection (a)'s mandatory remand requirement kicks in. On the other hand, if a transferee court could arrogate to itself the power to control all proceedings, including trial, the mandatory remand requirement of section 1407(a) could be subverted entirely—the JPML would never fulfill its obligation to remand the case "to the district from which it was transferred." Self-transfer, accordingly, "sets Congress's carefully crafted plan for multidistrict litigation on its head." Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 734 (1991).

The clash between respondents' argument and section 1407's scheme is put in sharp relief by section 1407(h). That provision explicitly allows the JPML to transfer cases "for both pretrial purposes *and* for trial." 28 U.S.C. § 1407(h) (emphasis added). That text is significant not only because it establishes that Congress knows how to authorize multidistrict transfers for trial when it so desires (*see Amicus* Br. of Charles Alan Wright 5-6), but also because it demonstrates that, when Congress has done so, it has made the *JPML*, not individual transferee courts, the arbiter of whether a broader transfer is warranted.

If, as Milberg claims (Br. 34), Congress intended to give individual transferee courts the power to decide whether to keep cases for trial, section 1407(h) would have vested *those courts* with that authority, and simply made clear that the transferee court could retain these cases notwithstanding any limitations in section 1404. Yet section 1407(h) does no such thing. That further demonstrates that Congress did not intend individual transferee courts to make ad hoc determinations as to the extent of their own authority over multidistrict cases.[3]

2. Even if we were wrong on all these points, however, respondents *still* could not prevail. That is because the only provision that respondents cite as authority for self-transfer—28 U.S.C. § 1404(a)—does not authorize that practice.[4] As explained in our opening brief, that provision states that "a district court may transfer any civil action to any *other* district or division"; it does not allow a court to engage in the oxymoronic practice of "transferring" an action to *itself*.[5]

Like the Ninth Circuit, respondents make no serious attempt to counter this argument. Instead, they simply

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[3] The fact, emphasized by respondents (Milberg Br. 32-33), that Congress did not expressly state that the authority in section 1407(h) existed "notwithstanding section 1407(a)" is of no import. Congress explicitly allowed section 1407(h) transfers for trial. In light of that clear language, there would be no need to state that a provision mandating remand before trial was no longer applicable to the specific subset of cases covered by 1407(h).

[4] Respondents' assertion that the section 1404 issue is not before the Court is flatly wrong. The question presented here squarely frames the issue of whether a court "may transfer [a] case to itself." Pet. i. It is well-settled that such an express reference to an issue satisfies the Court's requirements—*i.e.*, that petitioners need not draft long, unreadable questions that cite to "book and verse" for every contention they raise. *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982). Indeed, a contrary rule would hardly serve the Court's interests. *Cf.* S. Ct. R. 14.1(a) (question presented should be "short"). In any case, there can be no serious dispute that the section 1404(a) issue—which was addressed in detail in the petition itself (at 2-3, 12-13, 19) *and* in Milberg's opposition (at 11, 17-18) —is "fairly included" within the question presented here (S. Ct. R. 14.1(a)) and that all parties could reasonably expect it to be part of the merits briefing in this matter.

[5] Moreover, as our opening brief explained, and respondents make no effort to refute, even if section 1404 could be read to permit self-transfer, such a general provision could not overcome the specific congressional scheme for multidistrict litigation set forth in section 1407. *See Crawford Fitting Co. v. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Morales v. TWA*, 504 U.S. 374, 384 (1992).

assert—without ever parsing the relevant statutory language—that the phrase "other district" refers to "a district 'other' than the district in which the action was filed and otherwise would be tried." Milberg Br. 38. But this reading is plainly untenable when section 1404(a) is read in full. That provision, entitled "Change of Venue," states: "For the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only interpretation of that language that makes any linguistic sense is that the "other district" that may receive a case stands in contrast to the "district court" that "may transfer" it. *See* J.A. 69 & n.9 (Kozinski, J., dissenting).[6] Indeed, a district court is not "transferring" an action (or "changing" the venue) in any meaningful sense when it uses section 1404 to retain a case for trial. Rather, as Judge Kozinski explained, " '[i]t is simply proclaiming jurisdiction over the case.' " J.A. 69 (quoting Rhodes, *supra*, 140 U. Pa. L. Rev. at 740).

Finally, respondents hazard no response to our showing that the Arizona district court did not, in any event, even purport to apply the well-established statutory standards for section 1404 transfers. *See* Pet. Br. 29-30 & n.12; J.A. 72 (Kozinski, J., dissenting) ("[a]pplying normal 1404(a) standards, a venue transfer of this case . . . would never have been granted").[7]

[6] There is no substance to the contention that our understanding of section 1407 renders section 1404 a "dead letter" by creating a "gap" during which no such motions may be considered. Milberg Br. 35-36. While consolidated pretrial proceedings are still active and appropriate, *there is no reason* to transfer a case. And when those proceedings end or cease to be productive, the case must be remanded to the transferor court, which is fully empowered to consider an all-purpose section 1404 transfer.

[7] There is no basis for affording *Chevron* deference to the JPML's understanding of the federal transfer statutes. *Compare* Milberg Br. 30-31. As an initial matter, the statutory language here is clear, so deference would not be warranted in any circumstances. Beyond this, the *Chevron* rule, which is grounded in respect for the congressionally delegated administrative authority of Executive Branch agencies, provides no basis for this Court to defer to the views of lower federal court judges as to the meaning of a law governing the courts that this Court supervises—especially when those lower court judges' views were subject to no public review or comment. In any event, under no theory does the JPML administer *section 1404(a)*—and, as explained above, the district court's misreading of that provision is a wholly sufficient reason to reverse the Ninth Circuit's judgment.

B. Respondents' Legislative History Arguments Ignore the Detailed Evidence of Congress's Intent.

Our opening brief detailed the abundant evidence demonstrating that the Ninth Circuit's approval of self-transfer is inconsistent not only with the text of sections 1407 and 1404, but also with the relevant legislative history. Pet. Br. 21-24. The federal judges who proposed the statute told Congress that it "would not affect the place of trial in any case" and thus would achieve "efficien[cy] and econom[y] . . . without losing the benefits of local trials in the appropriate districts." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting report). The relevant House Report stated unequivocally that section 1407(a) "*requires* that transferred cases be remanded." H.R. Rep. No. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1901 (emphasis added). Indeed, that Report went so far as to state that Congress would have to enact "amendments" to authorize "consolidation and coordination for trial purposes." *Id.* at 1902.[8]

By contrast, respondents cannot unearth a single statement by a Member of Congress—or even a member of the judicial committee that proposed the bill—endorsing

[8] Respondents assert, without any support, that the Report's language about the need for statutory amendments to allow for trial consolidation was meant to refer only to the JPML. Pet. 25 n.14. But the Report broadly states that "amendments" would be necessary to allow for "consolidation and coordination for trial purposes." 1968 U.S.C.C.A.N. at 1902. Nothing in that statement suggests that a transferee court would be free to order such consolidation without any statutory amendments.

their theory that a *transferee* court can use section 1404(a) to transfer a case to itself and thereby avoid the statutory remand requirement.[9]

With nothing to point to in support of their position, respondents resort to putting their own spin on a few ambiguous statements about the possibility of section 1404 transfers. Milberg Br. 25-28. But those statements are uniformly consistent with the understanding that *transferor* courts could use section 1404 transfers as an alternative to, or in conjunction with, section 1407. Indeed, that is the *only* reading of these remarks that is plausible in light of the explicit statements recounted in our opening brief, including the House Report's unequivocal declaration that section 1407 "require[s]" remand. Pet. Br. 21-24.

Nor do respondents gain anything by relying on the post-enactment actions of the members of the judicial committee who ultimately became members of the JPML. The relevant question, for purposes of the legislative history, is not what these judges did with the legislation after it was passed, but what they told Congress about the legislation before it was passed. Notably, respondents never quote any of those judges' actual statements to Congress. That is understandable, because those individuals nowhere suggested that a transferee court could keep a case for trial proceedings. To the contrary, Judge Becker, the only judge who directly addressed the question, said exactly the opposite:

> Unless disposed of during the pretrial proceedings in the transferee court, the transferred actions *must be remanded* to the transferor court at or before the conclusion of the pretrial proceedings, as provided in paragraph (a).

Hearings on S. 3815 and S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 21 (1967) (emphasis added). Judge Becker, moreover, further stressed that, since cases in which section 1404 transfers are desirable are already "dealt with satisfactorily," "these cases *were excepted from* [*the bill*]." *Id.* at 16-17 (emphasis added).

There is, in short, no basis in the testimony or the report of these judges from which to infer that Congress expected its direct language of command—that "[e]ach action . . . shall be remanded"—to be transformed into a meaningless suggestion that "each action shall be remanded unless the transferee court decides it should not be."

C. Respondents' "Common Sense" Policy Argument Is Directly Contrary to Congress's Own Explicit Policy Choice.

Respondents make no attempt to explain how the use of self-transfer in *this* case led to any efficiencies—indeed, they are unable to point to *any* coordinated proceedings in this action. Nevertheless, they argue that, in general, "common sense" supports approval of this practice. As they see the issue, transferee courts—or at least those courts that happen to be appropriate venues under section 1404—must be able to retain cases for trial in order to "bring order out of the chaos of numerous competing lawsuits." Milberg Br. 36. Respondents' argument is seconded, unsurprisingly, by a variety of *amici* representing the interests of *defendants* in multidistrict litigation—entities such as the American Insurance Association, the Aerospace Industries Association, and several major banks.

Congress, however, had other concerns in mind when it enacted section 1407, and it struck a very different balance. As explained in our opening brief (at 21-24,

[9] Respondents do cite the prepared statement of a private citizen (Phillip Price) who testified at a congressional hearing. *See* Milberg Br. 28 n.16. But they neglect to mention that when the *same citizen* expressed that view in his live testimony to the Committee, Senator Tydings quickly explained that the statute as drafted would *not* allow the case to be retained after the conclusion of coordinated pretrial proceedings. Indeed, it was precisely Senator Tydings's unequivocal retort to Mr. Price that we quoted in our opening brief. *See* Pet. Br. 22.

29-31), both the text of the statute and its legislative history demonstrate that Congress made a considered judgment to limit multidistrict transfers in order to preserve *plaintiffs'* forum selection prerogatives as well as the benefits of local trials. Congress further recognized that, in many instances, trial in the transferee forum is in fact inefficient. *See* 1968 U.S.C.C.A.N. at 1901 ("from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district"). Although Congress has been urged repeatedly to reach a different policy conclusion—to authorize multidistrict transfers for trial—it has uniformly declined to do so (except in the section 1407(h) context). *See* H.R. 2450, 102d Cong., 1st Sess. § 4 (1991); H.R. 3406, 101st Cong., 1st Sess. § 4 (1989); H.R. 4807, 100th Cong., 2d Sess. § 303 (1988).[10]

Respondents, and the repeat-player defendants who support them, should not be able to achieve by judicial interpretation what Congress has refused to grant through legislation. *See United States v. Noland*, 116 S. Ct. 1524, 1528 (1996) (courts may "not take it upon themselves" to make a determination that Congress "could have, but did not, make"). Accordingly, even if respondents' efficiency-based arguments were wholly persuasive, this Court would still be bound by the legislative judgment evinced by the plain text of section 1407 and its equally unambiguous legislative history. *See Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997).

In fact, however, joint multidistrict trials raise difficult policy problems—especially from a plaintiff's perspective. Multidistrict plaintiffs frequently suffer the inconvenience of traveling for trial to a distant city with a potentially hostile jury pool; they also often lose their opportunity to control their own cases and to craft arguments that will best advance their individual claims. *See* Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 890, 893. Plaintiffs with stronger cases are lumped together for trial with those with weaker ones, and all plaintiffs are forced to endure the kind of lengthy, complex trials that make it much more difficult for a jury to understand their evidence. *See* Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1043-44 (1993).

[10] Congress considered these amendments precisely because it understood that the present statute does not permit coordination beyond pretrial proceedings. *See* H.R. Rep. No. 102-373 at 7 (1991) ("Under the present rules, cases . . . may be consolidated for purposes of pretrial proceedings but then are returned to the district court from which they came."); H.R. Rep. No. 100-889, at 41 (1988) ("Transfer is currently authorized for pre-trial proceedings only.") (quoting Department of Justice analysis); 129 Cong. Rec. 28313 (1983) (Rep. Kastenmeier) ("once the pretrial phase is completed, the transferee court must return the individual cases to their respective original district courts . . . . there is currently no mechanism for the consolidation of the trials themselves").

Moreover, even in cases where consolidation for trial might be fair and efficient, section 1404(a) would still be an ill-suited tool for effecting such transfers. As respondents acknowledge, section 1404(a) permits a transfer only to a court in which every one of the consolidated multidistrict cases "might have been brought." Only by happenstance, therefore, would an all-purpose transfer be available to the transferee court. Section 1404(a) thus hardly provides a rational mechanism for achieving the ends that respondents seek.

In sum, as Professors Wright *and* Miller have jointly—and correctly—explained, while commenting on this very case, since "surely Judge Kozinski is right that the statutory foundations" for self-transfer are "shaky," the reasonable way to address this issue is through a "revision to Section 1407." 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3867, at 119 (1997 Supp.). The American Law Institute has also recommended that section 1407 be amended to allow for consolidation for trial *—though only with careful safeguards. See* American Law Inst., *Complex Litigation: Statutory Recommendations and Analysis* § 3.01, at 38 (1994) (enumerating new criteria and safeguards to be considered in trans-

ferring multidistrict matters for trial). If consolidation for trial is to be authorized, it should be through considered congressional review of such detailed proposals, not through a jerry-rigged, ad hoc scheme that presses the general transfer statute into service in a context for which it was never designed.

II. RESPONDENTS HAVE OFFERED NO TENABLE REASON NOT TO ADDRESS THE PURE QUESTION OF LAW SQUARELY PRESENTED BY THIS CASE.

When Lexecon sought certiorari on the self-transfer issue, respondents argued that this case did not squarely present that issue because Lexecon had waived its argument and because, in any event, any error was harmless. Milberg Opp. 20-26. Lexecon's reply brief explained (at 4-8) why those arguments lacked merit, and the Court granted certiorari. Although respondents now rehash the very same claims, there is no reason for the Court to consider them again. *See United States v. Williams*, 504 U.S. 36, 39 (1992) (refusing to consider waiver argument rejected at certiorari stage; given the Court's scarce resources, any other course of action "would be improvident indeed"). Even if the Court decides to look at these matters again, however, respondents' claims have not improved with age.

a. Respondents' first contention—that Lexecon somehow failed to preserve its objection to the self-transfer by not petitioning the JPML directly—represents an abrupt and opportunistic about-face. When Lexecon sought mandamus in the Ninth Circuit to challenge the Arizona court's self-transfer order and compel the court to relinquish the case, respondents did *not* argue that Lexecon's only recourse was to petition the JPML. To the contrary, they argued that mandamus was inappropriate because Lexecon had a complete remedy on appeal from final judgment: "[*T*]*here is no question* that Lexecon can seek review of the order changing venue following final

judgment." [11] The Ninth Circuit accepted that argument in denying mandamus (J.A. 23), and respondents should not be heard to assert a contrary proposition now.

Beyond procedural fairness, Lexecon had no window of opportunity in which to bring this issue to the JPML. In accord with JPML Rule 14(d), Lexecon brought the remand issue initially to the transferee court, the body best equipped to decide whether consolidated pretrial proceedings had ended. When that court, after a second request by Lexecon, finally ruled on the remand issue, it simultaneously transferred the case to itself—which, under JPML Rule 14(b), deprived the panel of all authority over this matter. Lexecon then sought relief through the only available means, first on mandamus and then—*following the very course of action urged both by respondents and by the Ninth Circuit mandamus panel*—on appeal after final judgment.

Under these circumstances, any attempt to fault Lexecon for not "seeking succor" from the JPML is indeed a "sucker-punch." J.A. 59 n.1 (Kozinski, J., dissenting). Lexecon was not required to defy the JPML's rules—and seek relief from a body that denied it had any authority—in order to preserve its claim, particularly in light of respondents' (and the Ninth Circuit's) directly contrary statement that the issue could be addressed after final judgment.

Moreover, the Arizona court did not simply refuse to refer the case to the JPML for remand; it *also* transferred the case to itself under section 1404(a). It was that self-transfer ruling that allowed the court to retain the case for trial in violation of section 1404 as well as section 1407. Since respondents do not—and cannot—claim that the self-transfer ruling should have been reviewed by the JPML, it was clearly proper for Lexecon to seek review on appeal in the Ninth Circuit and then before this Court.

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[11] Milberg Defendants' Response in Opposition to Petitioners' Motion for a Stay of District Court Proceedings Pending a Decision on their Petition for Writ of Mandamus 3 (9th Cir. June 9, 1995) (emphasis added; internal quotation omitted).

Finally, and in any event, there is no dispute that the Ninth Circuit actually decided the issue Lexecon presents here. That alone provides a solid basis for the Court to decide the question presented, regardless of any claim of prior procedural error. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of the Treasury*, 500 U.S. 1, 8 (1991).

b. Milberg's attempt to divert this Court from correcting the systematic misreading of the federal transfer statutes by the Ninth Circuit and countless other lower courts by invoking harmless error is no more persuasive.

Contrary to respondents' new-found contention that improper venue is a minor matter that cannot be remedied after final judgment, it is well-established that a party's "substantial rights" (28 U.S.C. § 2111) are *always* violated when, as here, its case is decided by a court that lacks the *authority* to rule under the federal venue laws. Absent waiver, a decision by a court that lacks statutory venue is no different than one by a court that lacks statutory jurisdiction; the proper (and only) remedy is reversal of the judgment. *See Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340 (1953) (reversing judgment after trial because of improper venue; "unless the defendant has also consented to be sued in that district, he has a right to invoke the protection which Congress has afforded him"); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (rejecting claim that adherence to venue statute "exalts form over substance"); *Sockwell v. Phelps*, 906 F.2d 1096, 1099 (5th Cir. 1990) ("harmless error analysis has no place in a case in which a party has not consented to or waived his challenge to the statutorily improper venue"); *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1434, 1437 (D.C. Cir. 1984) ("to find that [a] venue ruling was harmless error would undermine any policies Congress may have sought to promote when it chose to restrict venue").

Indeed, respondents do not even contest that a violation of a statutory venue requirement is reversible error.

Milberg Br. 43. They contend, however, that this case constitutes an exception to that ordinary rule because Lexecon *could* have brought suit in Arizona—*i.e.*, venue would have been proper in Arizona as an initial matter. Even if true, however, that is wholly beside the point. The key fact is that Lexecon, exercising its deeply-rooted right to select the forum, chose not to do so. When the case was sent to Arizona under section 1407, that court had authority to conduct only *coordinated pretrial proceedings*. The court's failure to remand the case after those proceedings had ended and its limited authority had expired was, therefore, unlawful—a violation of statutory venue requirements of precisely the kind that this Court has concluded requires reversal. Moreover, since section 1404(a) does not authorize self-transfer, the district court's judgment must be reversed for violating the requirements of that venue statute as well.[12]

In any event, Milberg's claim that Lexecon suffered no prejudice here blinks reality. Respondents, seeking to avoid a federal judge in Chicago who had rejected their key arguments, dragged Lexecon thousands of miles from home to a forum where "there was much popular feeling against Lincoln Savings, Charles Keating, and those (like [Lexecon]) who were associated with them." J.A. 74 (Kozinski, J., dissenting). No reasonable observer could conclude that Lexecon was not prejudiced by this forum-shopping strategy, especially in light of Milberg's extensive attempts at trial to exploit its unlawfully obtained advantage. *See id.* at 74 n.15 (describing how Milberg's counsel

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[12] Respondents cite dicta in two lower court cases (Milberg Br. 44) questioning whether a party could obtain relief after judgment—rather than on mandamus—where the court had *statutory authority* to transfer the case but was claimed to have abused its discretion in ordering the transfer. That dicta has no relevance here, where the Arizona court had no statutory authority either to maintain jurisdiction after consolidated pretrial proceedings ended or to transfer the case to itself. Moreover, as noted, Lexecon exhausted the mandamus route and was told by the Ninth Circuit (at respondents' urging) to raise the issue on direct appeal.

"peppered his [trial] arguments with references to Charles Keating's misdeeds and [respondents'] attempts to recover money for the victims").

Certainly, respondents' sudden concern for judicial economy rings hollow. They obtained the transfer to an inconvenient forum and to a judge with no familiarity with the case for the ostensible purpose of conducting coordinated pretrial proceedings and then—without any pretense of engaging in such proceedings—fought at every turn to avoid the legally required remand in this case. If they had simply acquiesced in the proper legal outcome in the first place, none of the potential waste that they now decry would have occurred.

c. Finally, *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), does not support respondents' claim. *Caterpillar* had nothing to do with the federal venue statutes, and it did not discuss, much less limit, *Olberding*'s holding that reversal is proper when statutory venue requirements are violated.

Beyond this, the *Caterpillar* Court stressed that allowing the judgment to stand was "in harmony" with relevant congressional policy. 117 S. Ct. at 476. Here, by contrast, the policy at the very heart of section 1407 is to authorize only *limited* transfers in order to safeguard plaintiffs' forum rights *even where* that may result in some inefficiency. To allow this judgment to stand in the name of "finality, efficiency, and economy" (Milberg Br. 45) would thus subvert Congress's core judgment in enacting section 1407.

Moreover, in sharp contrast to *Caterpillar*, there was never any "curing" of the key procedural mistake in this case. *Compare* 117 S. Ct. at 476-77. Nothing that occurred after the Arizona court's improper self-transfer decision rendered that decision proper. Thus, that venue error—which, as noted, is no different than a jurisdictional error in this regard—infected the case throughout. And

it will continue to infect multidistrict cases around the country unless and until this Court acts to correct it.[13]

III. THE APPROPRIATE RELIEF HERE IS TO VINDICATE THE STATUTORY COMMAND THAT MULTIDISTRICT CASES MUST BE REMANDED AT OR BEFORE THE CONCLUSION OF COORDINATED PRETRIAL PROCEEDINGS.

This Court's practice is to decide the legal question raised by a case by announcing a generally applicable rule of law; the lower courts can then apply that rule to the facts of the case. *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 117 S. Ct. 1040, 1054 (1997); *United States v. Lanier*, 117 S. Ct. 1219, 1228 (1997). There is no need to depart from that salutary practice here. The Court should simply declare that transferee courts lose their authority to rule when consolidated pretrial proceedings end and an appropriate motion asserting the right to remand is made. The consequences of those principles for this case can and should be addressed on remand.[14]

In any event, the proper relief in this case is obvious. Respondents effectively *concede* that no coordinated pre-

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[13] Respondents' other arguments deserve little discussion. This is plainly not an appropriate vehicle to decide how *Time, Inc. v. Pape*, 401 U.S. 279 (1971), would apply to the particular facts at issue here; indeed, that matter was not even addressed by the court of appeals. Nor would it be appropriate for the Court to give its ruling only prospective effect. This Court has been sharply critical of the practice of purely prospective judicial rulemaking. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-97 (1993). In any event, respondents make no attempt to explain why this is the kind of truly extraordinary case that could satisfy *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

[14] There is no merit to respondents' claim that the Court is somehow barred from following that established course of action here. Milberg Br. 48-49. The question presented in Lexecon's petition stressed that multidistrict transfers are "solely for 'consolidated pretrial proceedings' " (Pet. i), and the petition itself (at 2-3, 16, 17) made plain that Lexecon's legal argument—tracking the plain language of the statute—was that such cases must be remanded "at or before the conclusion of such pretrial proceedings."

trial proceedings ever occurred and that there was no prospect of such proceedings at the time Lexecon made its motion. Accordingly, any rulings made by the district court after that date were outside its statutory authority. *See* J.A. 79 n.22 (Kozinski, J., dissenting) (all orders after August 1994 request for remand "were beyond [the court's] authority" and "should be vacated").[15]

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the matter remanded with instructions to vacate all district court orders after the conclusion of consolidated pretrial proceedings and to return this case to the JPML for remand to the Northern District of Illinois.

Respectfully submitted,

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[15] For that reason, the separate argument of the Cotchett respondents is unavailing. The Arizona court entered a Rule 54(b) judgment as to them in June 1995, a month *after* its order illegally transferred the case to itself. *See* CR 602. That order was thus void, and the case remains open as to them. Moreover, the underlying decision granting summary judgment to those parties was issued in April 1995, nearly a year after any hope of coordinated proceedings had ended and Lexecon had asserted its right to a remand.